

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

9 JUAN JOSE AMESQUITA,) 1:05-00055-REC-TAG HC
10 Petitioner,) ORDER REQUIRING RESPONDENT TO
11) FILE RESPONSE
12 v.) ORDER SETTING BRIEFING SCHEDULE
13 ROD HICKMAN,) ORDER DIRECTING CLERK OF COURT
14 Respondent.) TO SERVE DOCUMENTS

16 _____ Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ
17 of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed his Petition on January 12, 2005.
18 (Doc. 1). Petitioner filed an amended petition on May 11, 2005. (Doc. 7).

19 The Court has conducted a preliminary review of the Petition. Accordingly, pursuant to Rule
20 4 of the Rules Governing Section 2254 Cases and Rule 16 of the Federal Rules of Civil Procedure,¹
21 the Court HEREBY ORDERS:

24 A. AN ANSWER addressing the merits of the Petition and due within **NINETY**
25 **(90)** days of the *date of service* of this order. Rule 4, Rules Governing Section

²⁷ ¹The Federal Rules of Civil Procedure are “applicable to habeas corpus proceedings to the extent that the practice
in such proceedings are not set forth in the statutes of the United States and has heretofore conformed to the practice of civil
actions.” Fed.R.Civ.P. 81(a)(2). Rule 11 also provides “the Federal Rules of Civil Procedure, to the extent that they are not
inconsistent with these rules, may be applied, when appropriate, to the petitions filed under these rules.” Rule 11, Rules
²⁸ Governing Section 2254 Cases.

1 2254 Cases; Cluchette v. Rushen, 770 F.2d 1469, 1473-1474 (9th Cir. 1985)

2 (court has discretion to fix time for filing an Answer.).

- 3 – Respondent SHALL INCLUDE with the Answer any and all
4 transcripts or other documents necessary for the resolution of the
5 issues presented in the Petition. Rule 5 of the Rules Governing Section
6 2254 Cases.
- 7 – Any argument by Respondent that Petitioner has *procedurally*
8 *defaulted* a claim(s) SHALL BE MADE in an ANSWER that also
9 addresses the merits of the claims asserted. This is to enable the Court
10 to determine whether Petitioner meets an exception to procedural
11 default. See, Paradis v. Arave, 130 F.3d 385, 396 (9th Cir. 1997)
12 (Procedurally defaulted claims may be reviewed on the merits to serve
13 the ends of justice); Jones v. Delo, 56 F.3d 878 (8th Cir. 1995)
14 (whether it is more likely than not that no reasonable juror fairly
15 considering all the evidence, including the new evidence, would have
16 found Petitioner guilty beyond a reasonable doubt necessarily requires
17 a review of the merits).
- 18 – Petitioner's TRAVERSE, if any, is due **THIRTY (30)** days from the
19 date Respondent's Answer is filed with the Court.

20 B. A MOTION TO DISMISS due within **SIXTY(60)** days of the *date of service*
21 of this order based on the following grounds:²

- 22 i. EXHAUSTION - 28 U.S.C. § 2254(b)(1). A Motion to Dismiss for
23 Petitioner's failure to exhaust state court remedies SHALL INCLUDE
24 copies of all the Petitioner's state court filings and dispositive rulings

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26 ²Rule 4 of the Rules Governing Section 2254 Cases provides that upon the court's determination that summary
27 dismissal is inappropriate, the "judge shall order the respondent to file an answer or *other pleading . . . or to take such other*
28 *action as the judge deems appropriate.*" Rule 4, Rules Governing Section 2254 Cases (emphasis added); see, also, Advisory
Committee Notes to Rule 4 and 5 of Rules Governing Section 2254 Cases (stating that a dismissal may obviate the need for
filing an answer on the substantive merits of the petition and that the Attorney General may file a Motion to Dismiss for
failure to exhaust.); also, White v. Lewis, 874 F.2d 599, 60203 (9th Cir.1989) (providing that Motions to Dismiss pursuant
to Rule 4 are proper in a federal habeas proceeding.)

1 so as to allow the Court to examine the limitations issue. See, Ford v.
2 Hubbard, 305 F.3d 875 (9th Cir. 2002); Kelly v. Small, 315 F.3d 1063
3 (9th Cir. 2003);

4 ii. STATUTE OF LIMITATIONS - 28 U.S.C. § 2244(d)(1). A Motion to
5 Dismiss the Petition as filed beyond the one year limitations period
6 SHALL INCLUDE copies of all Petitioner's state court filings and
7 dispositive rulings.

8 iii. SECOND OR SUCCESSIVE Petitions - 28 U.S.C. § 2244(b). A
9 Motion to Dismiss the Petition on the basis of § 2244(b) SHALL
10 include a copy of the previously filed federal Petition and disposition
11 thereof.

12 2. OPPOSITIONS to Motions to Dismiss SHALL be served and filed within
13 EIGHTEEN (18) days, plus three days for mailing. All other Oppositions SHALL be
14 served and filed within EIGHT (8) days, plus three days for mailing. REPLIES to
15 Oppositions to Motions to Dismiss SHALL be served and filed within eight (8) days,
16 plus three days for mailing. Replies to Oppositions to all other Motions SHALL be
17 served and filed within eight (8) days, plus three days for mailing. If no opposition is
18 filed, all motions are deemed submitted at the expiration of the opposition period.

19 3. Unless already submitted, both Respondent and Petitioner SHALL COMPLETE and
20 RETURN to the Court along with the Response or Motion to Dismiss, a Consent
21 form indicating whether the party consents or declines to consent to the jurisdiction of
22 a the United States Magistrate Judge pursuant to Title 28 U.S.C. § 636(c)(1).

23 4. RESPONDENT SHALL submit a Notice of Appearance as attorney of record within
24 SIXTY (60) days of the date of service of this order for purposes of service of court
25 orders. See, Local Rule 83-182(a), 5-135(c).

26 5. The Clerk of the Court is DIRECTED to SERVE a copy of this order along with a
27 copy of the PETITION and any exhibits/attachments, on the Attorney General or his
28 representative.

1 All motions shall be submitted on the record and briefs filed without oral argument unless
2 otherwise ordered by the Court. Local Rule 78-230(h). All provisions of Local Rule 11-110 are
3 applicable to this order.

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5 IT IS SO ORDERED.

6 **Dated:** December 12, 2005
j6eb3d

/s/ Theresa A. Goldner
UNITED STATES MAGISTRATE JUDGE

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